Supreme Court, U.S.
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No. 92-1182

In The

Supreme Court of the United States

October Term, 1992

PAULINE EWALD,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF WASTE MANAGEMENT; CYNTHIA V. BAILEY; K.C. DAS; WINSTON EVANS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether two lower courts' dismissal of a plaintiff's "whistle-blower" claim by the application of well established precedent and rules of procedure is worthy of review by the Supreme Court of the United States.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 3

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 5

Other

Rule 15, The United States Supreme Court 1

Rule 77(d), Federal Rules of Civil Procedure 4

STATEMENT OF THE CASE

Petitioner Pauline Ewald was formerly employed by the Department of Waste Management for the Commonwealth of Virginia ("DWM") as Manager of the Superfund Pre-Remedial Program. She was discharged from DWM for poor performance and attendance in August of 1988. Following her discharge, she filed an administrative complaint with the United States Department of Labor, alleging that her discharge was retaliatory, prompted by her accusations of misuse of funds by DWM. She also filed suit in federal district court, alleging a variety of federal and state law claims.

Respondents (DWM and three DWM employees) challenged Petitioner's suit by a motion for summary judgment, supported by affidavits and records. Petitioner responded only with a self-serving and conclusory affidavit. Her response was found insufficient by the trial court to raise a material issue of fact, and summary judgment was granted to the Respondents (Petition at 29a). Petitioner's appeal from this order was rejected by an unpublished opinion of the Fourth Circuit Court of Appeals (Petition at 1a).

The Petition contains some misstatements or incomplete statements of fact, which, pursuant to Rule 15 of this Court, Respondents will address. Contrary to her assertions, Petitioner did not serve in her position with DWM "loyally and with distinction" (Petition at 9). As the lower courts noted, Petitioner's job performance was questioned as early as the fall of 1986 by the Director of DWM, Respondent Cynthia Bailey, who also counselled Petitioner about her poor job performance on at least two

occasions. Moreover, Petitioner's immediate supervisor, Respondent K.C. Das, received only minimal support and cooperation from Petitioner from the time he became her supervisor in April of 1987 (Petition at 6a). Das gave Petitioner only a marginally satisfactory rating in August of 1987 (*Id.*).

Only after her August performance rating did Petitioner contact the Environmental Protection Agency to report alleged misappropriations within DWM. Petitioner does not include in her Petition the fact that the Department of Labor, prior to the rulings of the lower courts, had found that her discharge was based upon her poor performance, which pre-dated and was not related to her whistle-blowing (Petition at 41a). Her poor performance continued thereafter, and she received a series of disciplinary charges over the next ten months for disruptive behavior and poor performance, culminating in her termination. (Petition at 6a-8a).

For these charges, Petitioner "had no fewer than four pretermination opportunities to respond" (Petition at 23a), and, while there was a factual dispute about the extent of her opportunity to respond to the last two charges, the lower courts found as a matter of law on uncontested fact that Petitioner was afforded adequate notice of the nature of the charges against her and, moreover, that she could have been terminated on the basis of the first four charges without considering the last two. (Petition at 24a).

SUMMARY OF ARGUMENT

This Petition is wholly without merit because it raises no novel or important issue, fails to suggest any conflict among the circuits, and does not even suggest that the lower courts applied incorrect legal standards in dismissing Petitioner's complaint. Instead, Petitioner is asking this Court to apply the same rules of law and precedent to reach a different conclusion on the merits of her claims. Accordingly, this case does not warrant discretionary review by this Court.

ARGUMENT

There is no reason to grant the petition for certiorari in this case. Petitioner's first stated ground is simply that the Fourth Circuit erred in sustaining the trial court's granting of summary judgment to Respondents. In doing so, the Fourth Circuit Court applied the correct standard of review (no issue of material fact relevant to an essential element of the non-moving party's case) as announced by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Moreover, the Fourth Circuit examined the record "in a light most favorable to the party opposing the motion" (Petition at 10a) in affirming the trial court's ruling. That Petitioner does not agree with the results is of no consequence in terms of the need for review by this Court.

Petitioner concedes that she "generally agrees" with the Fourth Circuit's "articulation of the standards for summary judgment and review of summary judgment decisions" (Petition at 36). Instead, she invites this Court

to review the record to find discrepancies in the findings of the fact of the lower courts. Petitioner had urged both of the lower courts to find material issues of fact without success and uses over twenty pages of her Petition to reargue her view of the facts in this Court. The argument is both meritless and unworthy of review through a petition for certiorari.

The second issue for which Petitioner seeks review by this Court is also meritless. She argues that she did not receive proper notice of the trial court's pre-trial order (specifying discovery cut-off dates) as required by Rule 77(d), Federal Rules of Civil Procedure, thereby prejudicing her rights to discovery. The Fourth Circuit accepted Petitioner's argument that she should have been served with the pre-trial order by mail. Nevertheless, that court also accepted the trial court's conclusion that Petitioner received the pre-trial order at least one month before filing an "emergency" motion for relief from it. (Petition at 13a). These circumstances, coupled with Petitioner's law degree and demonstrated competence in legal writing and oral advocacy, supported the trial court's decision to enforce the terms of the pre-trial order against Petitioner. Appropriately, the Fourth Circuit ruled that it would not reverse this exercise of discretion by the trial court.

The trial court's finding that Petitioner received adequate notice of the pre-trial order is supported by the record. Whether a litigant should be required to adhere to a trial court's pre-trial order is a matter of discretion which should not be reviewed by an appellate court. It certainly is not worthy of review by this Court.

Finally, Petitioner urges that the Court grant *certiorari* because the Fourth Circuit allegedly misapplied this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), by rejecting her argument that her due process rights were denied in her termination from employment with DWM. Petitioner does not argue that there is any conflict among the circuits in interpreting the *Loudermill* decision, nor does she argue that the Fourth Circuit misinterprets it. Instead, Petitioner argues that the Fourth Circuit erred in applying the *Loudermill* test. This argument is premised upon Petitioner's characterization of the facts in the record. For example, Petitioner argues that her final termination notice was "vague" (Petition at 58). What Petitioner fails to recognize, however, is that she was given a series of notices detailing her disruptive behavior and performance problems, which made her liable to discharge "even in the absence of the additional charges" (Petition at 24a). Moreover, it is undisputed that Petitioner refused to acknowledge receipt of the last charge. Her refusal to avail herself of the grievance procedure for this and the earlier charges prompted the Fourth Circuit to observe that due process requirements "are not violated merely because the plaintiff fails to take advantage of available procedures" (Petition at 23a). Again, it is readily apparent that Petitioner's argument does not raise any significant issue warranting review by this Court.

CONCLUSION

This Petition should not be granted because it raises no issue of constitutional significance warranting review by this Court. Applying well established principles of constitutional and statutory law, the lower courts ruled Petitioner's complaint meritless as a matter of fact and law. Petitioner has distorted the record and ignored the sound precedent and analysis set forth in both opinions below in her attempt to obtain review. Her Petition should be denied forthwith.

Respectfully submitted,

Commonwealth of Virginia, et al.

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